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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No._____

WASHINGTON PARISH SCHOOL BOARD, ET AL.,
Petitioners

versus

VERTREES MOSES, ET AL.,
Respondents

• • •

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES FIFTH CIRCUIT
COURT OF APPEALS

RESPONSE NOT PRINTED

• • •

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES FIFTH CIRCUIT
COURT OF APPEALS

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Washington Parish School Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 10, 1972, denying your petitioner's request for rehearing and

further to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 8, 1972, affirming the judgment and opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division, entered on August 9, 1971.

OPINIONS BELOW

The judgment of the Fifth Circuit Court of Appeals denying petitioner's application for rehearing and the judgment of the Fifth Circuit Court of Appeals affirming the judgment and opinion of the United States District Court for the Eastern District of Louisiana, New Orleans Division, have not been reported and the latter is reproduced in the Appendix to this petition beginning on page 55.

The judgment and opinion of the United States District Court for the Eastern District of Louisiana affirmed by the Fifth Circuit Court of Appeals in the decision aforementioned is reported in 330 Fed. Supp. 1340 (1971) and is reproduced in the Appendix to this petition on page 57.

JURISDICTION

The judgment of the Court of

Appeals below (Appendix infra page 55) was entered on March 8, 1972. The timely petition for rehearing was denied on April 10, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

At the commencement of the 1969-70 school term, the Washington Parish School Board instituted a geographical zoning plan of pupil assignment throughout the Parish. All elementary school students in the zone encompassing the Town of Franklinton, Louisiana, were assigned to Franklinton Elementary School, a formerly all-white elementary school. Since 1953, school officials at Franklinton Elementary had utilized a non-graded educational program composed of eleven (11) levels of instruction with homogeneous grouping into levels and into sections (groups within a level) based on the needs and achievements of individual students. Throughout the years of the operation of the non-graded educational program extraordinary success was achieved in upgrading the quality of education provided students at Franklinton Elementary 95% of whom were disadvantaged white children and prior to institution of this program ranked substantially below the national average in all academic areas. As a direct result of the non-graded educational program the students attending Franklinton Elementary School rapidly progressed to the point of exceeding the national average in all academic areas and became competitive, academically with the top schools in the state, including schools with students coming

QUESTIONS PRESENTED FOR REVIEW

from educated and greatly advantaged homes.

After the geographical zoning plan was instituted at Franklinton Elementary, the racial composition of the student body was greatly altered, becoming 70% black to 30% white; however, the new student body had one characteristic which was similar to the student bodies of previous years, i.e., the predominance of children coming from disadvantaged homes. Educators at the school recognizing this similarity, firmly believed that the non-graded structure utilizing homogeneous grouping according to needs which had been most successful with former student bodies, would be particularly suitable to the needs of disadvantaged black and white students entering the school and therefore the non-graded homogeneous grouping program was retained for the 1969-70 school year and has been employed since that time.

Assignments to the various levels and sections within levels under the non-graded system were based on teacher evaluation and observations aimed at the day-to-day evaluation of classroom performance and the results of teacher conferences. The method of assigning students to classes with other students of similar needs has understandably resulted in a few all black sections within the various levels, usually among the slower learners in each level. How-

ever, the vast majority of the sections are composed of both black and white students. (See Exhibit "A" Appendix page 28). As had been the practice in earlier years, achievement tests were utilized where required to meet national educational standards and the results of these tests were made use of in diagnosing student deficiencies. The questions presented here relate to the constitutionality of the educational system administered at Franklinton Elementary School and the specific questions raised are, as follows:

I. Does an educational program based on the grouping of students according to their needs and deficiencies, which results in some all black sections within a student body having a 70% black - 30% white student composition, violate black students' rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution?

II. If question number I. above is answered in the affirmative, is the District Court empowered to require that each and every section (class) of students be racially integrated irrespective of the student assignment dictated by the faculty evaluation of such student's educational needs and deficiencies?

even, the vast majority of the sections are composed of both black and white students. (See Exhibit "A" Appendix page 29). As had been the practice in previous years, only seven years were utilized where required by local educational standards in the results of these tests were made of in differing student deficiencies.

III. Does the use of standardized ability and achievement tests as one of many criteria in the assignment of students to instructional groups within a school which has been totally integrated for two years and which has a student composition of 70% black and 30% white present a constitutional question and constitute a violation of the Fourteenth Amendment to the United States Constitution?

IV. Does the manner in which achievement test results are utilized in Franklinton Elementary School violate the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.--CITIZENSHIP; PRIVILEGES AND IMMUNITIES: DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Your petitioner is the Washington Parish School Board, whose responsibility it is to operate the public school system within Washington Parish in the State of Louisiana. Prior to the 1969-70 school term, the method of assignment to schools in the public school system in Washington Parish was based on freedom of choice. At the beginning of the 1969-70 school term a geographical zoning plan was instituted throughout Washington Parish with elementary school age children in the Franklinton area being assigned to the Franklinton Elementary School. Since 1953 school officials at Franklinton Elementary School had employed a non-graded program based on homogeneous grouping of students according to their needs and deficiencies. At the beginning of the 1969-70 school term under the geographical zoning plan then instituted, school officials continued to employ the non-graded program.

On August 22, 1970, respondents filed a motion for supplemental relief aimed at the educational program being administered at Franklinton Elementary School, alleging unconstitutionality in:

1. the method of assigning students to classes at Franklinton Elementary School and

STATEMENT OF THE CASE

2. the procedure for promotion of students at Franklinton Elementary.

During the trial on the motion, several days were consummed in presenting testimony by both lay and expert witnesses called by each side. After considering the testimony adduced at this hearing, the District Judge notified the parties that the Court intended to appoint an expert to evaluate the educational program at Franklinton Elementary School. Over the objection of the School Board, based on his lack of disassociation from respondent's expert, Dr. Leon V. Crowley was so appointed by the Court, visited Franklinton Elementary School for a short period of time and submitted his report. On August 9, 1971, the District Court entered the order and opinion which was subsequently appealed to the United States Court of Appeals for the Fifth Circuit, an appeal being noted to the Fifth Circuit on August 16, 1971. That Court entered its order and opinion affirming the District Court on March 8, 1972. Thereupon, a timely application for rehearing was filed by the School Board and on April 10, 1972, the application for rehearing was denied.

I. DOES AN EDUCATIONAL PROGRAM BASED ON THE GROUPING OF STUDENTS ACCORDING TO THEIR NEEDS AND DEFICIENCIES, WHICH RESULTS IN SOME ALL-BLACK SECTIONS WITHIN

THE STUDENT BODYHAVING A 70% BLACK - 30% WHITE STUDENT COMPOSITION, VIOLATE BLACK STUDENTS' RIGHTS TO EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

It is necessary at this point in order for the Court to become aware of the true significance of the decisions rendered in the lower Courts, that a brief summary of the salient features of the educational program utilized at Franklinton Elementary School be presented. The following is a summary of such features as developed by evidence adduced at the trial:

a. Education theory forming foundation of program:

Homogeneous grouping of students based on their needs and deficiencies results in a reduction of the range of needs a classroom teacher is confronted with and permits more individualized instruction and more intensive remedial education directed at the reduced range of needs, thus enhancing the overall quality of the education being received by all students. The disadvantaged child from a home devoid of academic interests and learning experiences is assigned to a section or class where there is a concentration of remedial instruction directed at the student's observed special

needs and deficiencies; he competes with other similarly disadvantaged students; is challenged yet not overpowered by the pace and scope of the instruction and finds that he can compete academically. As the basic needs arising from such student's disadvantaged environment are met, new learning experiences will provide movement from section to section to continue the challenge for initially disadvantaged students. For the more advantaged, the program is complimentary to their accelerated rate of learning and both the pace and method of instruction is designed to provide the appropriate challenge and incentive at all stages of academic development. Thus, a disadvantaged child of average or somewhat below average mental capacities completes the elementary school program in the normal time and is constantly challenged at every stage. The disadvantaged child of low mental capacity but capable of learning under intense remedial instruction directed at special deficiencies may move more slowly but covers the identical material provided to higher adievers. As contrasted with traditional graded school programs where low achievers receive social promotions and the classroom teacher lacks time to devote to their special needs resulting in ninth grade students who can't read first grade readers, every student in the non-graded program with the possible exception of a few

severely retarded children who in a larger and more affluent system would be assigned to special schools, are competent readers upon completion of elementary school.

b. Basic structure of the program:

To accomplish the purposes described above, there has been developed and refined in the Franklinton Elementary School over a period of nineteen years a non-graded program utilizing eleven levels of instruction with sections or classes within each level varying in number with the number of students functioning at each level. Each level constitutes instructional material designed for a grade or a portion of a grade in the traditional graded school program, i.e., levels 1, 2, 3 and 4 constitute a division of the first grade materials into four parts. An elementary explanation of levels of instruction as presented to students and parents is contained in Exhibit "A" Appendix page 28 . Each level of instruction is subdivided into sections or classes composed of approximately 30 students each and the sections are numbered alphabetically. In the 11th level, the equivalent of the 6th grade, for the 1970-71 session, there were a total of 140 students divided into 5 sections. Four of the five sections were thoroughly integrated. (See Exhibit "A", Appendix page 28).

In each of these sections of level eleven, the same instructional materials (6th grade materials) were taught but the instructional techniques, extent of individualized instruction, special materials utilized and remedial instruction provided varied with the needs and deficiencies of the students who were assigned to sections where such needs and deficiencies were prevalent and could be best met. Assignments of students to instructional groups (sections) are made based on teacher evaluation and observation of individual student needs and deficiencies with a goal of narrowing the range of student needs found within the individual class or section resulting in a greater concentration of remedial and compensatory instruction directed at the particular class needs and enabling the teacher to provide more efficient individualized instruction. The teachers, black and white, at each level regularly meet to express their comparative evaluation of the needs and deficiencies of each child and to recommend both initial assignment and subsequent movement of each child to or from a section as particular needs are met.

c. Educational materials covered:

The students in Franklinton Elementary School during their attendance at the school are given the same instructional program and proceed through the same instructional materials albeit at varying speeds depending on individual needs and achievements; thus, a lower achiever is not provided a different course of in-

struction from a high achiever but rather the rate of progress of the two students through the instructional materials would differ.

d. Mobility:

Students are not "locked in" to the section and/or level to which they are assigned, but rather the program provides a system of continuous evaluation of each student with the aim of relocating him into a section or level better corresponding to his demonstrated needs. Opportunities for re-assignment arise not only at six or nine-week grading periods but at all times during the school year resulting in movement to either a higher or lower section based on the student's response to the instruction provided and observed elimination of prior deficiencies rendering the prior intensive remedial instruction in that area no longer necessary and allowing for a more rapid pace of instruction. (See Exhibits "c" and "d" Appendix page 45 and 49).

e. No discrimination:

Not one witness, lay or expert, found any evidence of racial discriminatory practices at Franklinton Elementary School.

f. Some heterogeneous or random grouping:

To provide social contact between all students assigned to lower and higher sections within a level, pupils were randomly assigned to classes receiving instruction in such subjects as art, music and physical education and participated together in all school activities, play periods, lunch periods and assemblies.

g. Teacher participation:

The program provides for greater teacher participation in the assignment of students to instructional groups and by narrowing the range of students deficiencies with which the teacher is confronted, helps him to provide more intensive instruction directed at remedying these deficiencies. Every teacher testifying at the trial, including black teachers called by the respondent, demonstrated great enthusiasm for the new system and seemed particularly satisfied with the teacher's role in the system and the success being achieved in providing educational instruction tailormade to individual students needs.

The District Court ordered school officials to "reassign students at the Franklinton Elementary School to heterogeneous, racially integrated classes".

The reason given by the District Court for its order was that "homogeneous grouping is educationally detrimental to students assigned to lower sections and blacks comprise a disproportionate number of students in the lower sections". If the reasoning of the District Court be correct, then the use of homogeneous grouping based on the needs and deficiencies of pupils will be discouraged in the public school systems of this nation. The significance of this decision and the reasoning set forth above cannot be underestimated. In every school in the United States where the non-graded program is utilized, the faculty, after assigning students to sections or classes, with each such class being designed by teacher assignment, instructional materials and planning to cope with special needs, must ascertain whether there exists any one class or section which is all-white or all-black, and if so, assign a student or students of the appropriate skin color to such class or classes regardless of whether the program of instruction therein is responsive for the students so arbitrarily assigned; otherwise, it would find itself in violation of the Court's mandate.

The only other alternative is to totally eliminate the non-graded program and any other innovative instructional program which does not make deliberate assignments to classes within a school

based on skin color. Because of the national importance and the significance of this decision as it affects educational research, innovative techniques and development, this Court should grant the writ of certiorari as requested.

It should also be noted from an examination of the order and opinion of the Fifth Circuit Court of Appeals in affirming the District Court's decision, that that court failed to meet frontally the issue presented above but rather dealt with the issue of standardized ability and achievement testing in assignment of students. The paramount issue in this case is not testing but the right of the school officials to employ a system of homogeneous grouping according to ascertained needs and deficiencies in assigning students to classes and although repeatedly pointed out in appellant's brief and petition for rehearing, the Fifth Circuit Court of Appeals failed to utter one word relative to such grouping. However in affirming the District Court's decision, it impliedly sanctioned the reasoning and opinion of the District Court as relates to grouping according to individual needs and deficiencies. Thus, the decision becomes unfortunate precedent and injects the Federal Court into a realm heretofore unentered, ie., that of the formulation of the educational program to be administered at a school. A new door has been opened and Federal Courts may now find themselves confronted with a host of new cases attacking varied educational programs within a school heretofore the province only of school officials. The significance of this step

should be readily apparent and thus the time has come for this Court to consider the important issues presented in this case.

The decision is also contrary to the law as it has heretofore developed in other Circuits. In the case of Swann vs. Charlotte Mecklenburg Board of Education, 300 F. Supp. 1358, p. 1367, 4Cir., Justice McMillan decided the issue of the constitutionality of homogeneous grouping according to achievements and needs in the following manner:

"Individual students are evaluated annually in terms of achievement in particular subjects, and divided into groups for the study of particular subjects in accordance with their achievement. (This is not, truly described, the "track" system which was elaborately criticized by Judge Skelly Wright in his 119 page opinion in Hobson v Hansen, 269 F. Supp. 401. D. C.,D.C. 1967) Few black students are in the advanced sections and most are in regular or slow sections. Assignments to sections are made by various schools based not on race but on the achievement of the individual students in a particular subject. There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustrations. It is an educational

rather than a legal matter to say whether this is done with the students all in one classroom or separated into groups."

The same considerations as in the instant case were present in the Swann case (although it should be noted that in the Swann case students were evaluated and assigned to classes annually whereas in the instant case movement opportunities exist on a day-to-day basis throughout the school year) and the decision therein announced is clearly in conflict with the decision reached by the District Court and the Appellate Court in the case at bar.

There are varied schools of thought on the advantages and disadvantages of the traditional school versus non-graded school programs and homogeneous grouping according to demonstrated needs and deficiencies versus heterogeneous assignments. If the Courts choose to become the final arbiter, deciding which educational school of thought should be allowed to express itself in our public school programs, then it has done more without the benefit of any expertise than national educational organizations composed of learned and imminent experts have even thought of doing. There is no clear concensus of expert opinion favoring or disfavoring homogeneous grouping. In fact, the expert testimony

in this case clearly reveals that every expert testifying advocated a different type educational program varying from respondent's expert who favored total heterogeneity and would utilize a one-room school house seating all students of all ages and instructional levels with teachers walking the aisles whispering instructions, to the Court appointed expert who favored even more extensive grouping than that provided in the educational program at Franklinton Elementary School. The District Court's decision puts the Courts squarely into the shoes of school officials and educational experts.

The Court's other premise is that any school employing a program of assignment to classes in which every class is not integrated is not constitutionally permissible is in violation of the equal protection clause of the Constitution and must be enjoined.

This is contrary to recent decisions of this Court. In the case of Swann v. Charlotte Mecklenburg Board Of Education, 91 S. Ct., 1267, 1276 (1971), Justice Burger, speaking for the Court regarding limitations of a federal court's power to meddle with schools to produce a racial balance, stated as follows:

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities

whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charges with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court".

It is time for this Court and we request that this Court grant your petitioner's application for certiorari to clarify the constitutional goals of the desegregation process.

II. IF QUESTION NUMBER I. ABOVE IS ANSWER IN THE AFFIRMATIVE, IS THE DISTRICT COURT EMPOWERED TO REQUIRE THAT EACH AND EVERY SECTION (CLASS) OF STUDENTS BE RACIALLY INTEGRATED IRRESPECTIVE OF THE STUDENT ASSIGNMENTS DICTATED BY THE FACULTY EVALUATION OF SUCH STUDENT'S EDUCATIONAL NEEDS AND DEFICIENCIES?

To rephrase the issue, does the Federal Court have the power to determine the racial makeup of classes within a school which is 70% black and 30% white without any evidence or proof that school officials and teachers are assigning students to classes for racial purposes? It is submitted that where assignments to classes are based upon a sound educational program designed to meet the needs and deficiencies of all students of all races, the Court should not interfere. It is further submitted that the authority of the Court should end with desegregation of the school's faculty and facilities and the authority of the educator is paramount in prescribing any reasonable uniformly administered program of education within such school. This is particularly true in the instant case. Under these circumstances there would not exist any constitutional question which would excuse the action of a Court in ordering racial mixtures in each and every classroom irrespective of and in derogation of a sound program of education.

III. DOES THE USE OF STANDARDIZED ABILITY AND ACHIEVEMENT TESTS AS ONE OF MANY CRITERIA IN THE ASSIGNMENT OF STUDENTS TO INSTRUCTIONAL GROUPS WITHIN A SCHOOL WHICH HAS BEEN TOTALLY INTEGRATED FOR TWO YEARS AND WHICH HAS A STUDENT COMPOSITION OF 70% BLACK AND 30% WHITE

PRESENT A CONSTITUTIONAL QUESTION AND CONSTITUTE A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The general issue of the use of achievement and standardized ability tests in assigning students has not been heretofore ruled upon by this Court. Prior to this decision, the Fifth Circuit Court of Appeals has dealt with the use of such tests in assigning students into one school or another, holding that such methods of assignments to schools could not be employed in a non-unitary school. However, there has been no decision regarding the use of such tests in assigning students to classes within a school. Recently, the Fifth Circuit Court of Appeals has extended this prohibition to recently desegregated schools. in referring to a school where the dual system had been disestablished for only one semester.

It is time for this Court to define what is a unitary school and for what period of time total desegregation must exist before a school is deemed to be a unitary school.

The Court should take this opportunity to use the facts as presented and developed in this case to provide a workable formula for lower federal courts

to use in determining when a school is unitary.

IV. DOES THE MANNER IN WHICH ACHIEVEMENT TEST RESULTS ARE UTILIZED IN FRANKLINTON ELEMENTARY SCHOOL VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The record amply reveals that standardized ability and achievement tests although administered at Franklinton Elementary School were used for diagnostic purposes only and not for the primary purpose of assigning students to sections or levels. Although both the District Court in its opinion and the Fifth Circuit Court of Appeals in its decision explicitly state that they are not determining the "per se validity" of testing, they in effect have done just that. For if testing can not be used in its traditional sense in diagnosing a student's needs and deficiencies in a completely desegregated school, then just when can it be used? No evidence was introduced to show that students were assigned to levels and sections based on their scores on standardized ability and achievement tests but rather all the evidence indicated that teacher evaluation based on many criteria formed the method of assignment. This Court should grant your petitioner's request to define the limitations on the use of testing in assigning students. Schools throughout

the nation are administering standardized tests to meet national standards, thus the issue becomes one of national importance and this Court's decision is required in order to provide a workable definition of constitutional testing. If such is not provided, then the uncertainty created regarding the use and future of standardized ability and achievement testing will be extremely detrimental to the nation's educational programs.

CONCLUSION

For the reasons heretofore assigned, your petitioner respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

W. W. ERWIN
District Attorney
Franklinton, Louisiana

WELTON O. SEAL
Attorney at Law
Bogalusa, Louisiana

CERTIFICATE OF SERVICE

I, Welton O. Seal, a member of the Bar of the United States Supreme Court, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals has been served on all opposing counsel of record in accordance with law and the rules of the United States Supreme Court by depositing the same in the United States mail with first class postage prepaid, addressed to the below described counsel of record at his post office address.

GEORGE M. STRICKLER, JR.
Attorney at Law
606 Common Street
Suite 304
New Orleans, Louisiana

Bogalusa, Louisiana, this the day of July, 1972.

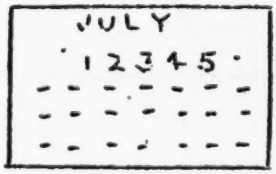
Welton O. Seal

CHILDREN DO NOT ADVANCE BY GRADES.

Each child's progress is determined:

Not by a stop watch

Not by a date



Not by a birthdate

Not by the neighbors

But - -

By his own growth,
achievement, and maturity

FRANKLINTON ELEMENTARY READING PROGRAM

Level 1	Games to Play Fun With Tom and Betty My ABC Book	
Level 2	My Little Red Story Book My Little Green Story Book My Little Blue Story Book Pre-Primer Workbook	
Level 3	The Little White House Primer Workbook Under the Apple Tree (Supplementary)	
Level 4	On Cherry Street First Grade Reader Workbook Open the Gate (Enrichment)	COMPLETE FIRST GRADE READING PROGRAM
Level 5	We Are Neighbors Workbook	
Level 6	Around the Corner Workbook Ranches and Rainbows (Enrichment)	COMPLETE SECOND GRADE READING PROGRAM
Level 7	Finding New Neighbors - Workbook	
Level 8	Friends Far and Near - Workbook Fun and Fancy (Enrichment)	COMPLETE THIRD GRADE READING PROGRAM
Level 9	Roads to Everywhere - Workbook Our Story Road (Enrichment)	COMPLETE FOURTH GRADE READING PROGRAM
Level 10	Trails to Treasure - Workbook Along Story Trails	COMPLETE FIFTH GRADE READING PROGRAM
Level 11	Wings to Adventure - Workbook On Story Wings (Enrichment)	COMPLETE SIXTH GRADE READING PROGRAM

Achievement tests are given at the end of each level to determine the degree of success.

The following subjects will also accompany each reading level according to the needs of the student:

Math	Health	Spelling	Writing
Science	Social Studies	Language	

FRANKLINTON ELEMENTARY SCHOOL

THE NONGRADED ELEMENTARY SCHOOL

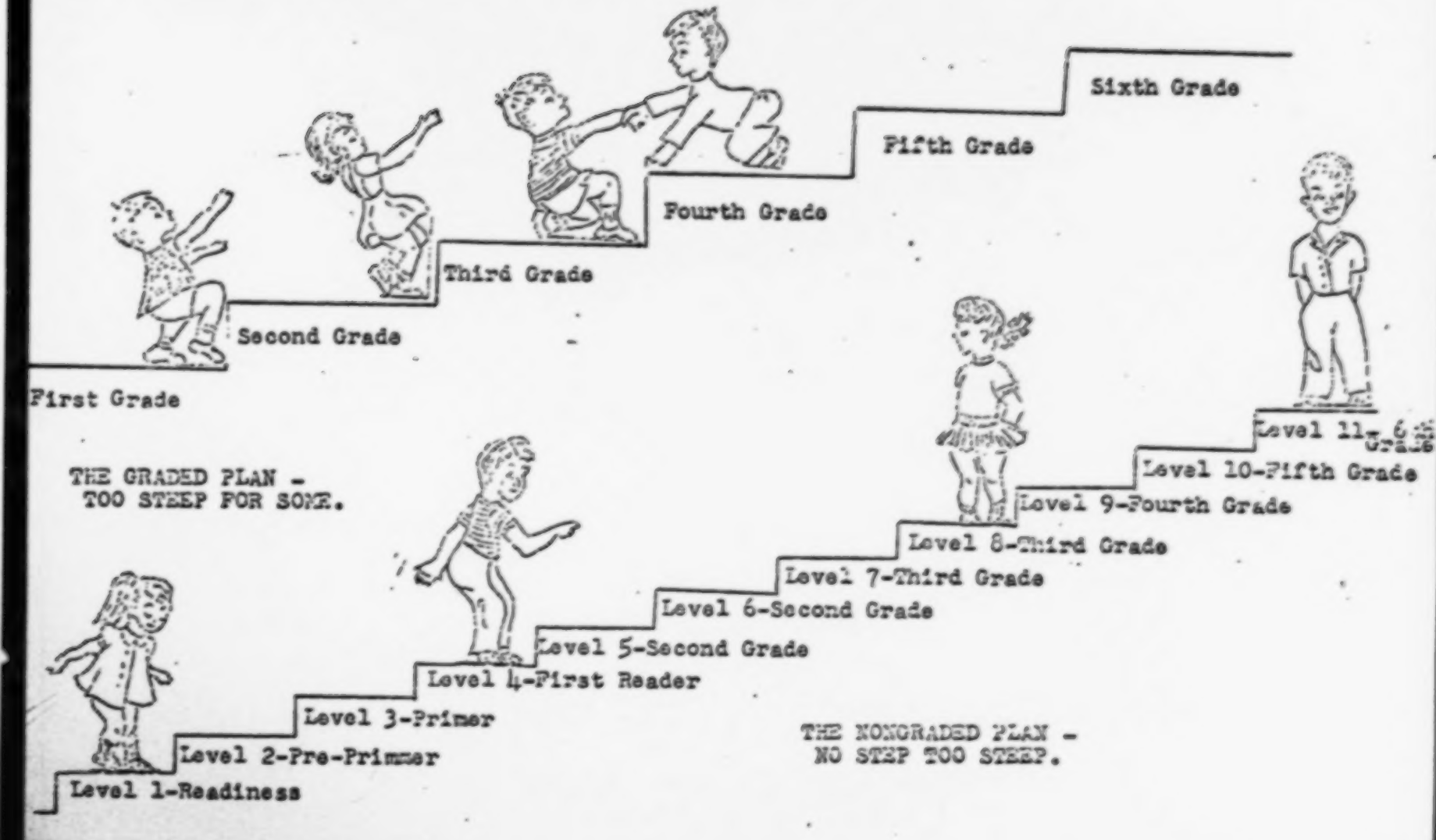


EXHIBIT "A"

STUDENT ASSIGNMENT IN
FRANKLINTON ELEMENTARY
SCHOOL FOR 1970 - 71 SESSION

1st. grade
(Levels 1, 2, 3 and 4)

Students are sectioned only on chronological age for the first two weeks of school. Then, they are given a PMA Test that indicates their readiness for the First Program. They are sectioned by their degree of readiness as indicated by test results. Teacher assignments are not known until the classes are sections. Teachers are as follows:

White - Mrs. Ann Wilson
Mrs. Nancy Forrest
Mrs. Lillie Mae Ford
Mrs. Lola Bullock
Mrs. Bonnie Coleman
Mrs. Hazel Richardson
Mrs. Patsy Hargrove
Mrs. Louann Holmes
Mrs. Juanita P. Skinner

Black - Mrs. Bessie Bickham
Mrs. Ellender Carter

2nd. grade
(Levels 5 and 6)

Section A

W-19 B-11
Mrs. Bea Garrett - W
Mrs. Eva Kohla - B

Section B

W-16 B-14
Mrs. Eva Kohla - B
Mrs. Bea Garrett - W

Section C

W-11 B-19
Mrs. Odera Stogner - W
Mrs. Glynn Robison - W

Section D

W-6 B-22
Mrs. Aylene Sanders - W
Mrs. Johnnie Butler - B

Section E

W-0 B-23
Mrs. Johnnie Butler - B
Mrs. Aylene Sanders - W

Section F

W-0 B-22
Mrs. Glynn Robison - W
Mrs. Odera Stogner - W

3rd. grade
(Levels 7 and 8)

Section A

W-24 B-8
Mrs. Lillie M. Pettitt - W
Mrs. Myrtle Johnson - B

Section B

W-11 B-20
Mrs. Betty Logan - W
Mrs. Patricia Crain - W
Mrs. Willie Johnson - B

Section C

W-11 B-24
Mrs. Patricia Crain - W
Mrs. Willie M. Johnson - B

Section D

W-0 B-26
Mrs. Lillie M. Pettitt - W
Mrs. Myrtle Johnson - B

Section E

W-0 B-31
Mrs. Willie M. Johnson - B
Mrs. Betty Logan - W

4th. grade
(Level 9)

Section A

W-14 B-18
Mrs. L. T. Moore - W
Mrs. Marjorie Byrd - W
Mrs. Willietta Burris - B

Section B

W-9 B-23
Mrs. Gladys McMillan - W
Mrs. Minnie L. Magee - B
Mrs. Marjorie Byrd - W

Section C

W-8 B-25
Miss Martha Burch - W
Mrs. Willietta Burris - B
Mrs. Minnie Lee Magee - B

Section D

W-9 B-23
Miss Martha Burch - W
Mrs. Minnie L. Magee - B
Mrs. Marjorie Byrd - W

Section E

W-8 B-22
Mrs. Minnie L. Magee - B
Mrs. Marjorie Byrd - W
Mrs. Gladys McMillan - W

(4th. grade cont.)

Section F

W-0 B-24
Mrs. Willietta Burris - B
Mrs. L. T. Moore - W

5th. grade
(Level 10)

Section A

W-20 B-7
Mrs. Arva Fussell - W
Mr. Willie Wheatley - B
Mrs. Hilda Stewart - W

Section B

W-16 B-16
Mrs. Maude D. Crawford - W
Mrs. Mae Ella Barnes - B

Section C

W-5 B-30
Mr. Willie Wheatley - B
Mrs. Doris Pigott - W

Section D

W-13 B-20
Mrs. Hilda Stewart - W
Mr. Willie Wheatley - B
Mrs. Mae Ella Barnes - B

(5th. grade cont.)

Section E

W-0 B-26
Mrs. Doris Pigott - W
Mrs. Hilda Stewart - W

Section F

W-4 B-24
Mrs. Mae Ella Barnes - B
Mrs. Maude D. Crawford - W

Section G

W-0 B-30
Mr. Willie Wheatley - B
Mrs. Arva Fussell - W

6th. grade
(level 11)

Section A

W-27 B-5
Mrs. Marian Duncan - W
Virgil Knight - W
T. J. Butler, Jr. - B

Section B
W-15 B-11
Mrs. Elizabeth Ard - W
T. J. Butler, Jr. - B
Mrs. Gladys Magee - B

(6th grade. cont.)

Section C

W-14 B-15
Mrs. Gladys Magee - B
Mrs. Elizabeth Ard - W
Virgil Knight - W

Section D

W-10 B-20
Virgil Knight 0 W
T. J. Butler, Jr. - B
Mrs. Elizabeth Ard - W
Mrs. Gladys Magee - B

Section E

W-0 B-23
T. J. Butler, Jr. - B
Myrtis Amacker - B
Mrs. Marian Duncan - W

EXHIBIT "B"

STUDENT ASSIGNMENT IN
FRANKLINTON ELEMENTARY SCHOOL
FOR 1969 - 70 SESSION

1st. grade

Section A

W-19 B-14
Mrs. Ann Wilson - W
Mrs. Gloria Magee - B
Mrs. Nancy Forrest - W

Section B

W-15 B-15
Mrs. Nancy Forrest - W
Mrs. Ann Wilson - W

Section C

W-16 B-15
Mrs. Vickie Knight - W
Mrs. Nancy Forrest - W
Mrs. Gloria Magee - B

Section D

W-0 B-31
Mrs. Gloria Magee - B
Mrs. Vickie Knight - W

(1st. grade cont.)

Section E

W-9 B-23
Mrs. Lillie Mae Ford - W

Section F

W-0 B-30
Mrs. Eleander Carter - B
Mrs. Lola Bullock - W

Section G

W-0 B-29
Mrs. Eleander Carter - B
Mrs. Lola Bullock - W

2nd. grade

Section A

W-22 B-23
Mrs. Aylene Sanders - W
Mrs. Johnnie Butler - B

Section B

W-0 B026
Mrs. Johnnie Butler - B
Mrs. Aylene Sanders - W

Section C

W-8 B-20
Mrs. Odera Stogner - W

(2nd. grade cont.)

Sec. C cont.
Mrs. Glyn Robison - W

Section D

W-5 B023
Mrs. Aylene Sanders - W
Mrs. Johnnie Butler - B

Section E

W-0 B-26
Mrs. Johnnie Butler - B
Mrs. Aylene Sanders - W

Section F

W-0 B-28
Mrs. Glyn Robison - W
Mrs. Odera Stogner - W

3rd. grade

Section A

W-13 B-17
Miss Paulette Crain - W
Mrs. Myrtle Jognson - B

Section B

W-7 B-23
Mrs. Willie M. Johnson - B
Mrs. Lillie M. Pettit - W

(3rd. grade cont.)

Section C

W-13 B-17
Mrs. Willie Johnson - B
Mrs. Betty Logan - W

Section D

W-13 B-21
Mrs. Myrtle Johnson - B
Miss Paulette Crain - W

Section E

W-0 B-31
Mrs. Lillie M. Pettit - W
Mrs. Bessie Bickham - B

Section F

W-0 B-31
Mrs. Bessie Bickham - B
Mrs. Betty Logan - W

5th grade

Section A

W-17 B-7
Mrs. L. T. Moore - W
Mrs. Elaine Smith - W
Mrs. Willietta Burris - B

(5th. grade cont.)

Section B

W-20 B-10
Mrs. Ella Mae Barnes - B
Willie Wheatley - B
Mrs. Maude D. Crawford - W

Section C

W-18 B-12
Willie Wheatley - B
Mrs. Doris Pigott - W
Mrs. Mae Ella Barnes - B

Section D

W-14 B-17
Mrs. Doris Pigott - W
Willie Wheatley - B
Mrs. Mae Ella Barnes - B

Section E

W-0 B-31
Mrs. Hazel Bagent - B
Mrs. Arvua Fussell - W

Section F

W-0 B-31
Mrs. Maude D. Crawford - W
Mrs. Mae Ella Barnes - B
Willie Wheatley - B

6th. grade

Section A

W-17 B-12
Mrs. Elizabeth Ard - W
T. J. Butler, Jr. - B
Virgil Knight - W

Section B

W-15 B-13
Mrs. Marjorie Byrd - W
Mrs. Marian Duncan - W
T. J. Butler, Jr. - B

Section C

W-7 B-23
Virgil Knight 0 W
Mrs. Gladys Magee - B
Mrs. Marjorie Byrd - W

Section D

W-8 B-22
Mrs. Marian Duncan - W
Virgil Knight - W
Mrs. Marjorie Byrd - W

Section E

W-0 B-32
Mrs. Gladys Magee - B
Mrs. Marjorie Byrd - W
W. J. Butler, Jr. - B

(6th. grade cont.)

Section F

W-0 B-30
T. J. Butler, Jr. - B
Mrs. Elizabeth Ard - W
Virgil Knight - W

EXHIBIT "C"

SECTION CHANGES AT MID TERM
OF THE 1970-71 SCHOOL YEAR.

FIRST GRADE:

From Section 1-A to Section 1-B

Ronnie Seal
Steven Thompson *
Randy Trayler

From Section 1-B to Section 1-A

Tracey Bickham *
Gerald Boudreaux
Robert Stewart *
Janice Allen *

From Section 1-F to Section 1-D

Barbara Conerly *
Juanita Luper

From Section 1-G to Section 1-D

Leroy Smith *

From Section 1-H to Section 1-I

Annette Brown*
James Daniels *
Bernard Palmer*
Davy Robinson *
William Stogner

*Black

(From Section 1-H to Section 1-I cont.)

Lisa Tate
Perry Johnson

From Section 1-H to Section 1-J

Rayville Warren *

From Section 1-H to Section 1-K

Rickey Wells

From Section 1-I to Section 1-H

Vanessa Brown *
Dwit Blackburd *
Vicki Dykes *
Oscar Robinson *
Janice Warren *
Jerry Fincher
Darryl Anders *

From Section 1-I to Section 1-J

Patricia Burton *
Larry Barker *
Tony Clark *
Tikki Magee

From Section 1-I to Section 1-K

Derrick Bickham*
Linda Cutrer

From Section 1-J to Section 1-I
Joe Thompson *

From Section 1-J to Section 1-K

Curtis Bickham *
Darlene Brown *
Jacqueline Brumfield *
Sherry Causey *
Joyce Fortenberry*
Darrel Fowler *
Kenny Jones*
Timothy Jones *
Varonica Magee *
Vickie Patterson *
Shelia Simmons *

From Section 1-k to Section 1-H

Norma McClain *
Kevin Tate *
Annette Magee *
Helen Magee *
Richard Magee *
Timothy Magee *
Ronald Spurlock *
Stephaney Thompson *

From Section 1-K to Section 1-J

Gary Bickham*
Gardner Cotton *
Reginald Crosby*
Gwendolyn Dyson *
Lucas Pigott *
Kevin Pittman *
Kathy Weary *

*Black

SIXTH GRADE:

From Section 6-D to Section 6-C

Judy Fincher
Frances Hart *
Olga Garrett *

From Section 6-E to Section 6-B

Evelyn Tate *

From Section 6-E to Section 6-D

Jewel Bickham *
Jerry Bickham *

CHANGES FOR SELECTED CLASSES ONLY:

Arnetha Green, from 6-A to 6-C, mathematics *

David Seals, from 6-A to 6-C, mathematics

Sheliah Barber, from 6-A to 6-C, mathematics

Matthew Harvey, from 6-A to 6-C, mathematics *

Tommie Walters, from 6-B to 6-A, mathematics

EXHIBIT "D"

SECTION CHANGES SINCE THE
BEGINNING OF THE 1970-71 SCHOOL YEAR

SECOND GRADE:

From Section 2-A to Section 2-B

Shander Wilson *

From Section 2-B to Section 2-A

Brenda Silas *
Bruce Williams
Gloria Taylor
Debra Varnado

From Section 2-B to Section 2-C

Antony Allen
Kenneth Givens

From Section 2-B to Section 2-D

Lawton Magee *

From Section 2-D to Section 2-B

David Burris *
Brenda Shanks *
Shelia Daniels *
Wade Warren *
Sandra Watson *
Charles Allen *

*Black

(Second Grade cont.)

From Section 2-D to Section 2-C

Donell Brown *
Janis Jenkins *
Jerry Baker *

From Section 2- C to Section 2-D

Wilda Schillings
Nicky Duncan

From Section 2-C to Section 2-E

Mark Athey
Carl Crain
Cedric Brown *
Orell Walker *

From Section 2-F to Section 2-D

Bobby Weary*

From Section 2-B to Section 2-D

Edward Stephens
Jay Warren

THIRD GRADE:

From Section 3-B to Section 3-A

Cynthia Stringfield
Timmy Crowe
Lisa Harvey *

*Black

(Third Grade cont.)

Venice Bickham *

From Section 3-C to Section 3-B

Barbara Tate *

From Section 3-D to Section 3-B

Jesse Watson
Carl Billiot
Herschell Norwood
Jimmy Jenkins

From Section 3-D to Section 3-C

Prentiss Magee *
Ronald Johnson *

From Section 3-F to Section 3-D

Toni Robinson *
Kenneth Causey *
Samanthia Abrom *

FOURTH GRADE:

From Section 4-C to Section 4-B
George Forrest
Debra Tate *

From Section 4-D to Section 4-E

Larry D. Bickham *
Obed Brumfield *

*Black

(Section 4-D to 4-E cont.)

Gregory Martin *
Beverly Bickham *
Brenda Jones *
Barbara Freeman

From Section 4-F to Section 4-D

Stanley Dyson *
Bruce Graves *
Beverly Bickham*

FIFTH GRADE:

From Section 5-B to Section 5-A

Joey Breland
Cynthia Harvey *
Virginia Howk
Bama Long *
Randy Smith *
Frankie Washington *

From Section 5-C to Section 5-B

Karen Brumfield
Preston Brumfield*
Dorothy Ray Lee *
Gwendolyn Smith *
Jerry Lee Silas
Jackie Norwood
Sidney Sumrall

*Black

From Section 5-C to Section 5-D

Eldon Dufrene

From Section 5-D to Section 5-C

Mona Lisa Anders *
Chandra Brumfield *
Catherine Holmes
Robert Taylor *

From Section 5-E to Section 5-G

Samual Conerly*
Gwinda Faye Crosby *
Juliette Dillon *
Shirley Tyson *

From Section 5-F to Section 5-B

Randy Pittman *

From Section 5-F to Section 5-C

Del Sharp

From Section 5-F to Section 5-D

Benjamin Ashby

From Section 5-G to Section 5-E

Donald Dawson *
Robert Magee *

*Black

SIXTH GRADE:

From Section 6-A to Section 6-B

Debra Hodges
Debra Singleton

From Section 6-C to Section 6-B

Esco Burton *
Mae Francis Dillon *
Philip Davis *

From Section 6-D to Section 6-E

Jerry Bickham *
Jewel Bickham *
Charles Green *

From Section 6-E to Section 6-D

Sharon Conerly *

*Black

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2561

VERTREES MOSES, ET AL,
Plaintiffs-Appellees,

versus

WASHINGTON PARISH SCHOOL BOARD, ET AL,
Defendants-Appellants.

Appeal from the United States
District Court for the
Eastern District of Louisiana

(March 8, 1972)

Before THORNBERRY, MORGAN, and CLARK,
Circuit Judges.

BY THE COURT: The issue presented for determination by the district court was whether the Franklinton Elementary School could assign students in a recently desegregated school to classrooms on the basis of standardized ability and achievement tests. Without determining the per se validity of the use of such tests and assignments, the district court found that the system as operated in the instant case tended to perpetuate segregated classrooms within the admittedly desegregated school. See Lemon v. Bossier Parish School Board, 5th. Cir., 1971, 444 F.2d 1400. There is substantial evidence to support the district court's judgment.

It is therefore ORDERED that the district court's order of August 9, 1971, is AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

VERTREES MOSES, by his father and next friend WILTON MOSES, and all other Negroes similarly situated — CIVIL ACTION

versus — NO. 15973

WASHINGTON PARISH SCHOOL BOARD, a corporation; LEON M. KNIGHT, President; and C. M. JONES, Superintendent, Franklinton, Louisiana. — SECTION B

George M. Strickler, Jr., Elie, Bronstein & Strickler, New Orleans, Louisiana; Debra Millenson, New Orleans, Louisiana

for plaintiffs

Honorable W. W. Erwin, District Attorneys for the 22nd Judicial District, Franklinton, Louisiana; Welton O. Seal, Seal, Lee & Branch, Bogalusa, Louisiana

for defendants

HEEBE, District Judge:

The issue presented for determination is whether or not the Franklinton Elementary School can assign students in the recently desegregated school on the basis of standardized ability and achivement tests. Without determining the per se validity of the use of such tests, the Court holds that testing, as presently used in Franklinton Elementary denies plaintiffs equal educational opportunity and impedes the immediate establishing of a truly unitary school as compelled by Alexander v Holmes County Bd. of Ed., 396 U.S. 19 (1969), and has the effect of tending to preserve the dual system of education prohibited under Brown v Board of Education, 346 U. S. 483 (1954).

School Desegregation in Washington Parish: 1965-70

This suit was filed in September 1965. At that time the town of Franklinton was served by four schools, all-white Franklinton Elementary and High School and all-black Washington Parish Elementary and High School. The first integration in the system occurred in January 1967 when nineteen black students enrolled in formerly all-white schools under a freedom-of-choice desegregation plan. At the beginning of the 1967-68 school year, 106 black students chose to attend white schools. Seventeen of

these students enrolled in Franklinton Elementary.

In April 1968, having found that freedom-of-choice had failed to effectively desegregate the system, the Court modified its existing orders to provide during the 1968-69 school year for the initial assignment of all students by freedom-of-choice followed by the mandatory transfer of black students sufficient to make the student body of each white school twenty per cent black. Under this plan approximately 672 black students were transferred to white schools in September 1968. Of this number, 138 were assigned to Franklinton Elementary. The first faculty integration also occurred in 1968-69. The staff of Franklinton Elementary was composed that year of five black teachers and twenty-three whites. As the parish's white schools were gradually desegregated, the black schools remained all-black, both in student population and, until 1968-69, in faculties. These schools were not only segregated but in comparison to their white counterparts decidedly inferior.

After Green v County School Board of New Kent County, 391 U.S. 430 (1968), this Court ordered the complete unification of the system by order dated July 3, 1969.

As a result of this order, the black students formerly attending the all-black Washington Parish School began attending Franklinton Elementary, the former all-white school. The black school followed an educational policy of graded structure and heterogeneously grouped students while the white school followed an educational policy of level structure and homogeneously grouped students.

Franklinton Elementary has divided its teaching (and/or learning) program into eleven levels, instead of the traditional six grades. However, the ordinary student usually completed the eleven levels in six years. In explaining the school's program to the Court and to parents, the school authorities analogize the level structure to the graded structure. Frequently, the terms "level" and "grade" are used with little or no difference in meaning. Levels 1 through 4 are comparable to grade one; levels 5 and 6 are comparable to grade two; levels 7 and 8 are comparable to grade three; and levels 9, 10 and 11 are comparable to grades four, five and six, respectively.

Franklinton Elementary groups all its students homogeneously. The grouping of students entering the first level is based on two standardized tests: The Primary Mental Ability Test (P.M.A.) - an I. Q. test - and the Ginn Reading

As a result of this order, the black students formerly attending the all-black Washington Parish School began attending Franklinton Elementary, the former all-white school. The black school followed an educational policy of graded structure and heterogeneously grouped students while the white school followed an educational policy of level structure and homogeneously grouped students.

Readiness Test. The grouping of all other students is based on the S. R. A. Achievement Test, the Ginn Reading Achievement test and teacher evaluation.

Students are grouped first into levels and then homogeneously grouped into sections. Within a single level there may be several sections, each denominated with a letter of the alphabet; the letter A represents the highest section, B the next highest, and so on. The educational philosophy for all this grouping is to put students of more or less equal ability and achievement into small groups which can progress through the various levels of materials to be learned at their pace. Under this method, theoretically every child progresses through all the materials either at a rapid or slow pace; consequently, no child ever fails, even though he may remain in the Elementary School for more than six years.

This educational program was initiated in Franklinton Elementary by Mr. Earl Brown, Acting Superintendent and formerly principal, in 1953. The program was found to be acceptable in the community; and endures to date, even though it exists in only one school in the parish.

In 1969 the elementary schools were integrated. More accurately stated, Franklinton Elementary (the former white school) absorbed Washington Parish Elementary (the former black school). The all-black school was closed and fifteen new classrooms were added at the white school. The closing of a school for

Such a practice was recently condemned in Bell v. West Point Mun. Sep. School District, _____ F. 2d ____ (#30175, 5th Cir. 1971), which held that "... an otherwise useful building may not be closed merely because the school board speculates that whites will refuse to attend the location. Such action constitutes racial discrimination in violation of the Fourteenth Amendment."

In West Point, the closing of the black school necessitated conducting classes on a "two shift a day" basis. In Franklinton the closing of the black school prompted the misspending of $44,888.00 of funds granted under Title I of the Elementary and Secondary Education Act to build fifteen new temporary classrooms at the white school. A report dated January 20, 1971, issued to Mr. William Dodd, Superintendent of Public Education for Louisiana, by S. P. Marland, Jr., U. S. Comissioner of Education, indicates that " . . . large amounts of Title I funds were being expended for general aid for the schools, rather than to conduct activities designed specifically to meet the special educational needs of educationally deprived children as required by Title I and Regulations thereunder . . . . " Mr. Charles Jarreau who now administers Federalls Assisted Programs for the Louisiana Department of Education testified that using Title I funds to build

those classrooms was a misuse of the funds.

Not only did the blacks lose their school, they also lost their principal and the educational policy of using a graded structure. The school board did not attempt to explain to the black parents and students involved why the educational policy of levels and homogeneous grouping which had never been used in the all-black school would be used in the new unified school in preference to the educational policy using grade structure previously in force in the black school. It was obvious the white school was to be maintained with its white principal and his educational policy.

Thus, while testing, which is essential in formulating the homogeneous grouping, was not imposed in Franklinton Elementary to coincide with integration, testing was first imposed on blacks at the time of full integration in 1969. Beginning in 1953, testing was imposed on all (white) students attending Franklinton Elementary. Until the 1969-70 school year all students were placed in two homogeneous groups: Math and reading. Beginning with 1969-70, the year of total integration, all students were grouped in only one homogeneous group based entirely on reading achievement and ability. The reason for this

change was not adequately explained although Mr. Ray Kennedy, the principal of Franklinton Elementary, did testify that one reason was the large influx that year of black students and teachers into the formerly all-white school. However, the effects of this change seem clear. It was the unanimous opinion of all the expert witnesses who testified on this subject that if homogeneous grouping is to function soundly, the grouping should be based on as many dimensions as possible. The experts agreed that grouping students for all subjects of study based on the test scores they receive in one subject such as reading is the worst form of grouping because it can often retard the child's progress in other subject areas. Applied to Franklinton, Dr. Scott Kester, plaintiffs' expert witness, testified that since black children ten to score lower on reading and verbal skills tests than on math and science tests, the effect of grouping them solely on their reading scores could seriously impede their progress in other areas, a result which apparently cannot be educationally justified.[1]

All experts likewise agreed that an essential feature of a non-graded ability-grouped educational structure designed to allow students to advance at an individual rate of progress is a remedial or compensatory educational program. Remedial education would hopefully provide

individualized instruction for those students who are slower learners or come from disadvantaged backgrounds to allow them to catch up to the students who are advancing through the non-graded structure at the normal level of progress. While the school board claims that compensatory education does exist, this Court is convinced, after hearing all the testimony including that of teachers, experts, and the Court's expert witness, Dr. Leon Crowley, that no real compensatory education exists for individual students within a given section inthe way of identifiable compensatory materials or individualized special attention. Rather, it appears that the school considered the nature of its homogeneous ability-achievement grouping to be in and of itself compensatory; that is, slow students were compensated by being placed with other slow students and being exposed to regular school materials at a slower pace. Dr. Crowley testified that such a program of compensatory education was not effective. This conclusion is buttressed by the findings of the HEW investigative team that little, if any, of Title I funds earmarked for compensatory education was being used for that purpose. As stated in the summary of the report on Washington Parish:

> "Over the years, although there have been sizable Title I <u>expenditures</u> in Washington Parish,

> "there has been no viable Title I program designed to serve the special educational needs of educationally deprived children on the basis of a valid needs assessment." At p. 12.

In this school, which is 69% black and 31% white, some fairly predictable racial patterns emerge in the groups as a result of the homogeneous ability or need grouping program based on testing. The higher sections within a level, denominated A and B, will have a higher percentage of whites than blacks, the middle and lower sections will have a higher percentage of blacks than whites, and the bottom sections, E, F and G, will almost invariably be 100% black. Eighty-two percent of the white students in the system in both the 1969-70 and 1970-71 school years were assigned to one of the top three sections in each grade while an average of 63% of all black students were assigned to the bottom three or four sections. Ninety percent of the students assigned to lower sections (D and below) over the past two years are black and significant percentages of the black enrollment of the school (48% in 1969-70 and 37% in 1970-71), have been assigned to all-black classes (generally the lowest two sections of each grade).

These figures reflect another evil of the ability-achievement homogeneous grouping as practiced in Franklinton Elementary - the minimal amount of fluidity within the system. Part of the rationale of a non-graded structure is to allow students to progress through the material at their own pace without having to wait until the end of a school year to get to new materials. Thus, in a successful non-graded structure, there should be a great deal of movement by students throughout the school year among the various levels of instruction. However, the evidence indicated that movement at Franklinton Elementary was very much like movement in a graded structure: nearly everyone remained in the same group and level throughout the entire school year and only changed groups and levels at the end of the year. This lack of mobility tends to lock students, especially those in the bottom sections, into the same section throughout grammar school. Since black students comprise the bulk of the lower sections, they tend to be most adversely affected by this lack of mobility.

The plaintiffs allege they are deprived equal educational opportunity. Their argument is based (1) on the premise that homogeneous grouping cannot be educationally justified and produces inherently harmful effects on those in the lower groups, and (2) on the sta-

tistics which indicate there is a disproportionate number of blacks in the lower groups.

The Court listened to several education experts who discussed the pros and cons of homogeneous and heterogeneous grouping. Each expert referred to various studies to support his opinion.

The Court agrees with the opinion of its own witness, Dr. Crowley, who stated:

> "Studies in the area of ability grouping are as numerous as they are inconclusive; grouping research tries hard to make up in bulk what it lacks in findings . . . . The problem then is: Do children grouped homogeneously achieve better over a limited period of time than children who are grouped heterogeneously, all other things being equal. Answer: Usually not. Further there is some evidence that while homogeneous grouping has no particular effect on children of high or middle ability, it adds to the disadvanatge of children of low ability. At this point, the research has never validated the educational rationale of grouping, that everyone benefits."

Similarly, Dr. Kester testified for the plaintiffs that disadvantaged and minority groups did less well under homogeneous grouping than under heterogeneous grouping. Dr. Kester also referred to an article entitled "Grouping," written by Dr. Glen Heathers, and appearing in the Encyclopedia of Educational Research, pp. 559-70 (4th ed. 1969). In this report, Dr. Heathers gives several reasons for the detrimental effects of homogeneous grouping: (1) the self-fulfilling prophecy phenomena - teachers expect less from students assigned to low groups and teach them correspondingly less, and students who are assigned to low groups generally expect less of themselves and behave accordingly; (2) slow learners, in the absence of superior students, have fewer opportunities to learn vicariously through classroom activities in which they can be stimulated by other students; and (3) the quality of instruction offered low groups tends to be inferior to that offered groups made up of abler students. At 566.

The per se validity of testing as a basis for student assignments has never been ruled on but testing as the basis of assigning students in recently desegregated schools has not been permitted.

In Singleton v. Jackson Municipal

Separate School District, 419 F.2d 1211 (5th Cir. 1969), rev. in part on other grounds, 396 U.S. 290 (1970), the Fifth Circuit, sitting en banc, held that " . . . testing cannot be employed in any event until unitary school systems have been established." At 1219. Thus, where a dual school system is disestablished, testing is not allowed in the formulation of the unitary system. See, United States v. Sunflower School District, 430 F.2d 839 (5th Cir. 1970); United States v. Tunica County School District, 421 F. 2d 1236, (5th Cir. 1970). Where a dual system had been disestablished for only one semester, the court again disallowed the use of testing as the basis for assigning students. Lemon v Bossier Parish School Board, _____ F. 2d ____ (#30447 5th Cir. June 1971). In that case, the court said:

> "In Singleton we made it clear that regardless of the innate validity of testing, it could not be used until a school district had been established as a unitary system. We think at a minimum this means that the district in question must have for several years operated as a unitary system." (emphasis added)

In the case at bar, Washington

Parish and the Franklinton Elementary School in particular has not operated as a unitary system for several years.

While no court has explained the rationale for not allowing the assignment of students on the basis of testing, a hint is given in United States v. Tunica County School District, supra. There, all the students who scored well on tests were to be assigned to the white school and those who scored poorly were to be assigned to the black school. It becomes readily apparent to anyone familiar with the nature of white and black schools in the South that the children going to the white school would be provided with better facilities, faculties and educational materials than their counterparts in the black schools. It is equally apparent, given the obvious reluctance and recalcitrance of school boards to establish unitary schools, that the school board in deciding to use testing probably anticipated that most whites would score well and thus used testing to maintain as segregated schools as possible. Testing used to resegregate students in a recently desegregated school system is not permissible.

Courts are not school boards and do no derogate unto themselves the formulation of educational policies. But courts are the vigilant protectors of

the constitutional rights of every American. If any existing school board policy violates or impinges on the equal protection clause of the Fourteenth Amendment, then that educational policy is impermissible.

This Court finds that the educational policy used at Franklinton Elementary to assign black students on the basis of the presently used testing violates their Fourteenth Amendment rights to be treated equally with white students. Homogeneous grouping is educationally detrimental to students assigned to the lower sections and blacks comprise a disproportionate number of the students in the lower sections. This is especially true where, as in Washington Parish, black students who until recently were educated in admittedly inferior schools are now competing with white students educated in superior schools for positions in the top sections.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that the Washington Parish School Board, Mr. Earl Brown, Acting Superintendent of the Washington Parish School System, and Mr. Ray Kennedy, Principal of the Franklinton Elementary School, their assigns and successors, be and they are hereby, ENJOINED from continuing to assign students at the Franklinton Elementary School to classes on the basis of standardized ability and

and achievement tests.

IF (sic) IS FURTHER ORDERED, ADJUDGED AND DECREED that the Washington Parish School Board, Mr. Earl Brown, Acting Superintendent of the Washington Parish School System, and Mr. Ray Kennedy, Principal of the Franklinton Elementary School, their assigns and successors, be, and they are hereby, ORDERED AND DIRECTED to reassign students at the Franklinton Elementary School to heterogeneous, racially integrated classes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Washington Parish School Board, be and it is hereby, ORDERED to pay all costs of these proceedings and that the fee and expenses of Dr. Leon Crowley, the Court-appointed expert, be taxed as part of the costs of these proceedings.

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[1]There was some testimony that one reason for this change to grouping based on only one dimension - reading- was the logistical inability to group the large number of incoming students on two dimensions. However justified this may have been for the first year, this in no way explains why Franklinton Elementary School to this day persists in one-dimensional grouping.

/s/ Frederick J. R. Heebee
UNITED STATES DISTRICT
COURT JUDGE

New Orleans, Louisiana

August 9, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71 - 2561

VERTREES MOSES, ET AL
Plaintiffs-Appellees,

versus

WASHINGTON PARISH SCHOOL BOARD, ET AL,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(April 10, 1972)

ON PETITION FOR REHEARING

Before [illegible], MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CERTIFICATE OF SERVICE

I, Welton O. Seal, a member of the Bar of the United States Supreme Court do hereby certify that three copies of the foregoing order issued by the Fifth Circuit Court of Appeals, denying the petitioner's application for rehearing which is to be appended to the Washington Parish School Board's petition for certiorari filed in the United States Supreme Court, has been served on opposing counsel of record in accordance with the law and rules of the United States Supreme Court by depositing the same in the United States mail with first class postage prepaid, addressed to the below described counsel of record at his post office address.

GEORGE M. STRICKLER, JR.
Attorney at Law
606 Common Street
Suite 304
New Orleans, Louisiana

Bogalusa, Louisiana, this the 18th day of July, 1972.

Welton O. Seal